

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH C. ZMUDZINSKI and SALLY A.
ZMUDZINSKI,

UNPUBLISHED
September 25, 2014

Plaintiffs-Appellees,

v

No. 315396
Cass Circuit Court
LC No. 12-000174-NZ

CASSOPOLIS AREA UTILITIES AUTHORITY,

Defendant-Appellant,

and

JOHN DOE, JANE DOE, RONALD FRANCIS,
GENE DECKER, RONALD BASS, LARRY
BALOK, MIKE SEEDORF, DEAN HASS, MEG
CLUCKY, and BALKEMA EXCAVATING INC.,

Defendants.

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I would affirm the trial court's denial of summary disposition and so respectfully dissent.

The parties dispute whether the flooding of plaintiffs' home on November 15, 2011 constituted a "sewage disposal event" which, under MCL 691.1416 through MCL 691.1419, constitutes an exception to governmental immunity. Defendant moved for summary disposition, asserting there was insufficient evidence to allow a reasonable fact-finder to conclude that a statutory "sewage disposal event" occurred. The trial court, after considering the parties' submissions, concluded that there was a factual dispute and denied defendant's motion.

The majority concludes that the trial court erred because no reasonable factfinder could conclude that the flooding was a "sewage disposal event." In order to reach this conclusion, however, the majority fails to follow the fundamental rule that, when reviewing a motion for summary disposition under MCR 2.116(C)(7), "this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Dextrom v Wexford Co.*, 287 Mich App 406, 428; 789 NW2d 211 (2010). If such contrary evidence exists, "the court must consider [it] to determine whether there is a genuine

issue of material fact.” *Id.* at 429. (footnote omitted). And, “if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate.” *Id.*

The majority reaches its conclusion by adopting the conclusions of defendant’s retained expert witness and then asserting that plaintiffs failed to adequately disprove those conclusions. Contrary to the majority’s approach, the test is not whether, after reviewing the defense case, the court believes that plaintiffs will or will not ultimately prevail. The test is whether plaintiffs have presented sufficient evidence to demonstrate a question of fact.

The evidence presented by plaintiffs demonstrates that on September 9, 2011, there was a sewage blockage in another resident’s lateral sewer line. In redressing that problem, a contractor flushed blocking materials from the lateral into the main line and defendant took no action to address this additional foreign material in the main line.

About two months later, on November 15, 2011, a residential contractor broke a fresh water line upstream from plaintiffs’ home. Defendant’s agents went to the scene and removed more than 3,000 gallons of viscous slurry from the ditch into which the water was leaking. The slurry was sufficiently thick so as to clog the exit from the tanker truck used to remove the slurry. Rather than disposing of this slurry at a site well, defendant released it into the main line, just upstream from plaintiffs’ home.

While defendant’s agents were pouring the slurry into the main line, a fire alarm went off at plaintiffs’ home. Plaintiffs were not home at the time, but later that day, it was discovered that the alarm was not due to a fire, but due to a short circuit caused by a flood of sewage. Defendant’s crew returned to the scene and located a blockage in the main sewer line just downstream from plaintiff’s lateral line.

Each party’s expert agreed that the cause of the flood in plaintiffs’ home could not be known with certainty. The defense expert offered two explanations relying on speculation that the flood in plaintiff’s home was a fresh water flood. These were wholly inconsistent with the evidence that the water removed from plaintiffs’ home was sewage water. The third explanation offered by the defense expert was that plaintiffs’ lateral line had developed a backup over a long period of time and that this slowly developing blockage became complete precisely when defendant poured slurry into the line, but that it was unrelated to the pouring of the slurry.

Plaintiff’s expert conceded that he could not determine the cause of the flood with certainty, but reviewed the relevant events and opined that dumping even just a portion of what the defendant’s employees dumped on the date of the flood was sufficient “to cause an overflow at . . . Plaintiffs’ home”

Given plaintiffs’ expert’s testimony and the chronology of events, I agree with the trial court’s conclusion that plaintiffs “have established a factual dispute sufficient to survive summary disposition.” Accordingly, I would affirm the trial court’s denial of defendant’s motion for summary disposition.

/s/ Douglas B. Shapiro